

and had been delivered into their custody, they could not be held to be responsible.

It was, even on cursory examination, not an unreasonable contention. Faced with it, Mr. Mohideen for the plaintiffs relied on the invoice as conclusive proof of the shipment.

Now, this invoice had never been introduced into evidence at any time before the plaintiffs' last witness. It was never previously mentioned in any affidavit of documents. As a matter of fact, the plaintiffs had at no time made such disclosure, even when pressed to do so by the solicitors for the defendants, though it must be said that the defendants would appear to be remiss in not compelling disclosure. Be that as it may, the invoice was a document that in the course of shipping did not need to be shown to the defendants as the party with the responsibility of operating a port. It might be needed for clearance by excise but for unloading purposes, the defendants needed no more than the bill of lading and a note of the markings on the cases. Then, of course, an invoice is a unilateral declaration, not made under oath, by a party who in this case was not a party to the action and not called as a witness.

Mr. Lim Peng Siew for the defendants made two points. First, he submitted that the invoice was inadmissible in the way in which it was sought to put it in. He relied on the authority of *Sin Tiew Bee v. Public Prosecutor*.⁽¹⁾ Secondly, he contended that the invoice even if admissible was not sufficient to establish the contents of the cases. What was needed at least was the evidence of the packer and the checker in addition to that of the exporter.

In my view and with respect, even after hearing Mr. Mohideen in reply, the submissions of Mr. Lim Peng Siew were sound. I ruled the invoice inadmissible.

At this stage, Mr. Mohideen applied for an adjournment to call the further evidence. However on the pleadings, it was evident from the commencement of the action that the onus lay on the plaintiffs to prove their loss and this they could do, where the contents of cases were said to be lost, only by proving what were sent in the cases and what were actually found therein. The difference would be their loss. They should therefore have come prepared with this evidence. It was not a matter that arose *ex improviso* or should have caught them by surprise. For these reasons, I ruled against the application.

In the absence of this evidence, I was of opinion that the plaintiffs had not proved their loss on a balance of probabilities and accordingly I dismissed their claim with costs.

Claim dismissed.

Solicitors: *Lim Kean Chye & Co.; Lim Huck Aik & Co.*

A LIAN YIT ENGINEERING WORKS SDN. BHD. v. LOH AH FON & ORS.

[O.C.J. (Abdul Hamid J.) May 13, 1974]

[Kuala Lumpur — Originating Motion No. 66 of 1973]

Administrative Law — Certiorari — Award of Industrial Court — Error on the face of the record — Excess of jurisdiction — Employment Ordinance, 1955, ss. 13 and 15 — Industrial Relations Act, 1967, ss. 41 and 42.

In this case the respondents, employees of the applicants, had absented themselves from work and gone on strike in protest against the dismissal of two of their colleagues. They were subsequently dismissed by the applicants. The matter was referred to the Industrial Court which held that the dismissal of the two workers by the management was inequitable and without just cause or excuse; that there was no lockout by the management and that there was a strike but it was a legal strike. The Industrial Court ordered the workers to be reinstated. On the motion for a *certiorari* it was argued that the record of the proceedings of the Industrial Court contained two errors on the face of the record, that is, (1) in finding that the dismissal of the workers by the applicant was improper or unjustified; (2) in not finding that the workers themselves terminated their services having broken their contract of service by going on strike and continuously absenting themselves from work for more than two days.

Held: (1) in the light of sections 13 and 15 of the Employment Ordinance it would seem clear that a worker who continuously absents himself from work for more than two days without reasonable excuse commits a wilful breach of the contract of service for which the employer may terminate his service without notice;

(2) in this case the Industrial Court failed to consider whether the workers did continuously absent themselves in circumstances falling within section 15(2) of the Employment Ordinance;

(3) as the matter in dispute in this case fell within sub-section (3) of section 12 of the Industrial Relations Act, 1967 the strike was illegal. The Industrial Court erred in law in finding that the strike was legal;

(4) since there were errors on the face of the record, the decision of the Industrial Court should be quashed.

Cases referred to:-

- (1) *Selangor Omnibus Company Ltd. v. Transport Workers Union* [1967] 1 M.L.J. p. 280.
- (2) *Rex v. Northumberland Compensation Appeal Tribunal Ex-parte Shaw* [1952] 1 A.E.R. p. 122 at p. 131.
- (3) *Wong Mook v. Wong Yin and 3 Ors.* [1948] M.L.J. p. 41 at p. 42.
- (4) *Gleneagles Hotel Ltd. v. Wong Joe Whee* [1956] M.L.J. p. 37.

ORIGINATING MOTION.

R. R. Chelliah and S. Kulasegaran for the applicant.

Dominic Puthucheary for the respondents.

Abdul Hamid J.: This is a motion for an order of *certiorari* to remove into this court for the purpose of being quashed Industrial Court Award No. 34 of 1973 made on September 3, 1973 on the grounds that the record of proceedings of the Industrial Court contains two errors of law on the face of it, namely (a) in finding that the dismissal of the workers by the applicant was improper or unjustified; and (b) in not finding that the workers themselves terminated their services having broken their contract of service by going on strike and continuously absenting themselves from work for more than two days.

The order is also sought on the ground that the Industrial Court acted in excess of its jurisdiction in ordering that the said 137 workers be reinstated and

in awarding compensation to the said workers in respect of the period they were absent from work.

The Industrial Court heard the case pursuant to a reference made by the Minister under section 16A (9) of the Industrial Relations Act, 1967 on May 29, 1973 on complaint made by the respondents. The applicant Lian Yit Engineering Works Sendirian Berhad is the employer of the respondents. The respondents were employed by the applicant to work at its factories at Sungei Besi and Prai.

In the statement of their case before the Industrial Court the respondents stated that two of the workers at the Sungei Besi factory — Kow Tuck Khoon and Kam Soo Har — were dismissed by the applicant. No reason was given for their dismissal. Both these workers saw the manager and asked for reasons for their dismissal. The manager told them that he could dismiss them as he liked. Both remained on the factory premises requesting for work but no work was given. On 6th April they went to work as usual but were told by the manager to collect their pay and leave the premises. They refused and the police were summoned. Both were forcibly removed.

On the same day the workers got together and elected their representatives to make representation on behalf of the two dismissed employees. In the meantime the management put up notice stating that they considered all workers who stopped work as having resigned on their own accord and should find work elsewhere. Thereupon the workers stopped work but remained within the premises.

Whilst Mat Amin and Tan sought the assistance of the Ministry of Labour and Manpower the police arrived in two riot squad vans, informed the workers that they had been dismissed and asked them to leave the company's premises by 5.00 p.m.

On 7th April the workers went to work but found that the gate was locked. They started picketing.

As a result the workers at the company's factory at Prai absented from work on 9th April. On 10th April they went to work as usual and held a demonstration in front of the company's premises before going in. Later the police arrived and drove all the workers out. It is alleged that on 11th April they went to work as usual but found the gate locked and they began picketing.

The applicant in reply stated that the two workers were dismissed for gross misconduct committed in the course of employment.

On 6th April the workers at the Kuala Lumpur factory refused to return to work and without due notice to the management declared a strike and prevented the workers from returning to work threatening them with bodily harm. They also switched off all power connections at the factory. The applicant also said that the workers walked out of the factory premises carrying with them benches. They positioned themselves at the gate obstructing traffic to or out of the factory.

On 7th April the management persuaded the respondents to return to work telling them that unless they returned they would be dismissed.

A On 11th April the applicant served on each and every respondent a notice terminating their service on the ground that the respondents had failed to resume work but the respondents refused to accept. It is the applicant's contention that at the material time the applicant needed full manpower in view of an enormous contract to complete works.

B The applicant said that the strike was unlawful and further said those workers at Prai were also lawfully dismissed as a result of their strike action.

After hearing the case the Industrial Court concluded that there were three issues to resolve —

- C (a) whether the dismissal of the two workers Kam Soo Har and Kow Tuck Khoon by the company on April 2, 1973 is or is not without just cause or excuse;
- (b) whether there was a lockout or a strike in the Sungei Besi and Prai factories of the company; and
- D (c) whether or not the dismissal of all the claimants was justified.

In respect of (a) the court found that the dismissal by the management was inequitable and without just cause or excuse. As for (b) it was found that there was no lockout by the management. It endorsed the management's view that there was no reason to lock the workers out. On the question of strike the court found that the workers did act in combination to stop work in spite of persuasion by the management to resume work both at Sungei Besi and Prai factories. The court also found that the workers began from 7th April afternoon to picket outside the gate. This developed into a strike involving 101 workers at Sungei Besi and 36 workers at Prai. The court however found that the strike was legal.

In arriving at a finding that the strike was legal the court stated as follows —

G "The strike was legal so long as sections 40 and 41 of the Industrial Relations Act, 1967 had not been contravened, nor had conciliation or adjudication proceedings commenced. The court finds that the workers were left in a quandry, not knowing whether they were deemed to have 'resigned' on 6th April or 'dismissed' on 11th April, for the management did not make the position clear in no uncertain terms. The combined action of the workers in such a situation was to withdraw rightly their labour, considering themselves as not having severed relations with the employer in the hope of negotiating fresh agreeable terms. The workers, therefore, acted within their right and so it was not open to the employer to dismiss them all outright."

The court also concluded by saying —

I "The management can find no favour in this court for its order of dismissal against those workers, as here, involved in a strike that has nothing vindictive or unreasonable but motivated by the predominant objective of promoting the welfare of the workers. Such an order is clearly not proper and so not justified."

At the hearing before me Mr. Chelliah counsel for the applicant submitted that if there is an error of law, the court can issue the order sought. [See *Selangor Omnibus Company, Limited v. Transport Workers Union*⁽¹⁾ and the case of *Rex v. Northumberland Compensation Appeal Tribunal Ex-parte Shaw*⁽²⁾].

It is, I think, well established law that this court has power to issue an order of certiorari to quash an Industrial Court's decision which, on the face of it, is wrong in law. The question that this court shall have to determine is whether there is any such error on the face of the record.

Mr. Chelliah argued that the court's finding that the dismissal of the workers by the applicant as improper and unjustified was wrong in law because the workers themselves terminated their services by breaking their contract of service, firstly, by going on strike and, secondly by continuously absenting themselves from work for more than two days.

I shall first of all deal with the second ground. In this regard Mr. Chelliah drew my attention to section 13(2) of the Employment Ordinance, 1955 which permits either party to a contract of service to terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service. He then referred to section 15 subsection (2) of the said Ordinance which reads —

"15 (2) A labourer shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two days —

- (a) without prior leave from his employer or without reasonable excuse; or
- (b) without informing or attempting to inform his employer of the excuse for such absence."

It is argued that the workers terminated their services even before the purported act of dismissal. I find the argument persuasive but with respect I find that this was not the applicant's contention before the Industrial Court. There it was contended that the services of the workers were terminated because they failed to resume work after absenting themselves from work.

The applicant knew of the reason or excuse for the workers' absence and I think it is common ground that the workers absented themselves from work to go on strike in protest against the dismissal of two of their colleagues. On the evidence before the Industrial Court the question that necessarily arose for determination was whether the workers had reasonable excuse to be so absent.

Willan C.J. in *Wong Mook v. Wong Yin and 3 Others*⁽³⁾ held that "the fact that the respondents had of their own volition absented themselves for the purpose of a strike cannot be held to be a reasonable excuse for their being absent from work without leave;" [See also *Gleneagles Hotel Ltd. v. Wong Joe Whee*⁽⁴⁾].

Whether a worker has been continuously absent from work for more than two days in circumstances falling within subsection (2) of section 15 of the Employment Ordinance is a question of fact. In this case the court held that there was no lockout and it made a finding that the gate was not locked on the mornings of the 6th and 7th April and thereafter and that the workers did act in combination to stop work. It, however, omitted to consider whether in these circumstances the workers had broken their contract of employment, and, if they had, whether their services were lawfully terminated by the applicant. In the light of

A sections 13 and 15 of the Employment Ordinance it would seem clear that a worker who continuously absents from work for more than two days without reasonable excuse commits a wilful breach of the contract of service for which the employer may terminate his service without notice.

B In the present case the court concluded that there were only three issues to be resolved. It never considered whether the workers did continuously absent themselves in circumstances falling within section 15(2) of the Employment Ordinance in spite of the fact that the applicant had stated that the workers refused to return to work on April 6th. On April 7th the workers were persuaded to return to work and were told that unless they returned they would be dismissed.

C It is difficult to speculate the decision the Industrial Court would have arrived at had it directed its mind to it. It would suffice for me to say that had the Industrial Court considered this question there was every likelihood that a person acting judicially and properly instructed as to the relevant law might not have arrived at a finding that it did. In my judgment the omission clearly constituted an error of law.

D In the instant case the court also found that there was a strike. However, it concluded that the strike was legal as it had not contravened either section 40 or 41 of the Industrial Relations Act, 1967. In consideration, I find that the court had not fully considered the effect of section 41(c) of the Industrial Relations Act which reads —

E "41. No workers shall go on strike ...

(e) in respect of any of the matters covered under subsection (3) of section 12."

F One of the matters covered by subsection (3) of section 12 of the Act is "the dismissal and reinstatement of a workman by an employer in circumstances in which subsection (1) of section 16A applies."

G On the face of the record it is revealed that a complaint was made to the Minister regarding the dismissal of the two workers on the ground that they were dismissed without just cause or excuse. Presumably this was done for the purpose of getting the Minister to intervene and secure a reinstatement. Subsection (1) of section 16A reads —

H "16A (1) Where a workman considers that he has been dismissed without just cause or excuse by his employer in circumstances other than those arising out of a contravention of section 46A he may, within one month of such dismissal make representation in writing to the Minister to be reinstated in his former employment."

I Since this is a matter covered by subsection (3) of section 12 it would seem that the workers had already contravened section 41 of the Act by going on strike. Such a contravention shall, in the light of section 42 of the Industrial Relations Act which provides that a strike if declared or commenced or continued in contravention of section 41, be deemed to be illegal. I am therefore inclined to agree with the submission made by Mr. Chelliah that the Industrial Court in holding that the strike was legal had erred in law. If the Industrial Court had found that the strike was illegal it is inconceivable that it would have held that the applicant's dismissal of the workers was improper and unjustified.

There is one other matter which I must deal with. It was submitted by Mr. Dominic Puthuchear that the Industrial Court Award No. 34 of 1973 no longer exists as the Industrial Court, in exercise of its power under section 53(4)(c) of the Industrial Relations Act had varied the award and substituted therefor Award No. 51/73, and there is no application to quash this award. I fail to see any merit in the argument. It is evident that the second award was the result of the first award and the validity of the second award would therefore depend on whether the original award was a proper and valid award.

In the light of my finding there seems to be no further necessity to consider the applicant's contention that the Industrial Court had acted in excess of its jurisdiction.

For reasons that I have stated it is my judgment that the applicant is entitled to the relief sought. The Industrial Court Award No. 34/73 is hereby set aside and costs.

Application allowed.

Solicitors: *Ranjit Thomas & Kula; Skrine & Co.*

RE LEE KIM CHING

[A.Cr.J. (Wan Hamzah J.) May 17, 1974]

[Ipoh — Criminal Revision No. 13 of 1974]

Evidence — Admissibility of admission made by offender — Refusal by lower court to admit admission — Failure of justice — Evidence Act, 1950, s. 24 — Criminal Procedure Code (F.M.S. Cap. 6), s. 422.

One Lee Kim Ching a juvenile was charged under section 380 of the Penal Code with committing theft of two gold rings. In the course of the trial one of the prosecution witnesses was going to testify about an admission made to her by the offender. The President of the Juvenile Court ruled that the admission by the offender to the prosecution witness was inadmissible. The offender was acquitted and discharged without defence being called. The President of the Juvenile Court subsequently forwarded the case record to the High Court with a view to revision.

Held: (1) under section 24 of the Evidence Act a confession is irrelevant only if it had been caused by inducement, threat or promise proceeding from a person in authority and since the prosecution witness in question was not a person in authority in relation to the offender section 24 did not apply in this case;

(2) under section 422 of the Criminal Procedure Code no finding or order made by a lower court is to be reversed or altered on account of improper rejection of evidence unless such improper rejection has occasioned a failure of justice. In the present case the rejection of the offender's admission had occasioned a failure of justice in that if the admission had been admitted the court would probably have found the offender guilty instead of acquitting her;

(3) in this case the offender should be discharged, such discharge not amounting to an acquittal, so that the prosecution can bring fresh proceedings against the offender if it wish to do so.

REVISION.

Wan Abdul Majid bin Wan Hamid, (Deputy Public Prosecutor) for the prosecution.

Soo Wai Sun for the respondent.

Wan Hamzah J.: The respondent, Lee Kim Ching, was charged under section 380 of the Penal Code with committing theft between 9.30 a.m. and 8.00 p.m. on

A 28 February 1973, of two gold rings belonging to Helene Wong Yoke Chan in a building used as a human dwelling.

According to the prosecution evidence the facts of this case are as follows. On 28 February 1973 at about 9.30 a.m. Helene Wong Yoke Chan, a hair stylist, went to work at the Diamond Hair Perm Parlour. She placed her handbag in the room of the owner of the shop, named Ah Heng. She kept her rings in the handbag. When she went home at about 8.00 p.m. or 9.00 p.m. she found her rings missing. The owner of the shop had a sister by the name of Khong Sai Moi who was working in the shop as an assistant. She was called by the prosecution as a witness (PW2). She testified that after hearing that Helene Wong Yoke Chan had lost her rings she went to the offender's house together with two other persons. There she asked the offender certain questions. The offender produced a ring, which was identified by PW2 as the ring marked as exhibit P1, i.e. one of the rings which Helene Wong Yoke Chan had lost. It appears from the record that during the course of the examination-in-chief of PW2 objection was raised by the defence counsel to the admission in evidence of certain matter which PW2 was about to testify, and it appears that what PW2 was going to testify was about an admission made to her by the offender. From the record it is not clear what the grounds of objection were precisely, but there were notes made by the learned President of the Juvenile Court referring to sections 112 and 113 of the Criminal Procedure Code and section 25 of the Evidence Act. In any event he made a ruling that the admission by the offender to PW2 was inadmissible. Then the trial of the case was continued until the close of the prosecution case when the offender was acquitted and discharged without defence being called.

The prosecution did not appeal against the decision of the learned President, but subsequently he himself forwarded the case record to the High Court together with a statement of the grounds of his decision for perusal with a view to revision if the High Court should find that such exercise is desirable. In the statement of his grounds of decision the learned President stated that the reason why he refused to admit into evidence what PW2 was about to testify as to the admission made to her by the offender was that "there is absolutely no evidence to establish that the admission made by the alleged offender was voluntary." It appears that the learned President now has some doubts as to the correctness of his decision.

On 2 May 1974 the parties to this case appeared before me to argue on the question of whether I should exercise revision in this case. On behalf of the offender it was contended that under section 24 of the Evidence Act a confession is irrelevant and therefore inadmissible unless it is shown that the confession had not been caused by any inducement, threat or promise, and since in this case the prosecution had not adduced evidence to show that there had been no inducement, threat or promise made to induce the offender to make confession, her admission to PW2 is inadmissible. On behalf of the prosecution it was contended that the learned President erred in refusing to admit that piece of evidence for two reasons: —